In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 899

THE NEW YORK TRUST COMPANY, AS TRUSTEE Under Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER

The question raised on the taxpayer's petition is the applicability of Section 202 (a) (2) of the Revenue Act of 1921 to the acquisition by the trustee on December 24, 1921, of the stock involved in this case. That Section is applicable to "property, acquired by gift after December 31, 1920, * * *." The trustee contends that this pro-

56388—34

vision does not cover gratuitous transfers in trust, and relies strongly on the fact that Congress in enacting the Revenue Act of 1924, added a provision to that Act (Section 204 (a) (3)) specifically relating to transfers in trust.

In our principal brief we have contended that Section 202(a)(2) of the 1921 Act is applicable to gifts in trust as well as to gifts direct. In support of this contention we have pointed out the contemporaneous and long-continued administrative construction of the statute to this effect; and we have argued that because of the language of the statute and this administrative construction, the change in the 1924 Act must be regarded as an explicit acceptance by Congress of the construction of the existing law in order to remove any possible doubt as to the correctness of that construction.

In addition to the arguments on this point in our main brief, we wish to call the attention of the Court to another consideration which seems to be very persuasive in leading to the conclusion that in enacting Section 204(a)(3) of the Revenue Act of 1924, Congress did not consider that it was enacting for the future a rule different from that which had been in effect under the 1921 Act. This argument depends upon the text of the new provision in the 1924 Act, which reads as follows:

> If the property was acquired *after December 31, 1920,* by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same

> as it would be in the hands of the grantor, * * *. (Italics ours.)

It will be recalled that in the 1921 Act, Section 202 (a) (2) was applicable to gifts "after December 31, 1920." The income-tax Title of the Revenue Act of 1921 was by its terms effective "as of January 1, 1921" (Section 263 of the Revenue Act of 1921); Congress thus made it plain that it intended the new provision of Section 202 (a) (2) to reach back to the effective date of the Act but not before that date. Indeed, it is doubtful if Congress could have made the provision applicable to prior gifts. When this Court upheld the retroactive operation of Section 202 (a) (2) with respect to gifts made in 1921 before the enactment of the statute, it said that there was no doubt as to the power of Congress with respect to "prior *but recent* transactions", and it held that Congress could properly make the provision in question applicable to "transactions consummated *within the year.*" *Cooper* v. *United States,* 280 U.S. 409, 411, 412 (italics ours).

The Revenue Act of 1924 was enacted on June 2, 1924. By Section 283 the income-tax Title of that Act was effective "as of January 1, 1924." If Congress had considered that in enacting Section 202 (a) (3) of the 1924 Act it was changing the law and prescribing a basis which had not theretofore been in effect, it seems clear that it would have limited the application of the new provision to the period to which the 1924 Act applied;

it would have made Section 202 (a) (3) applicable to property "acquired after December 31, 1923, by a transfer in trust." As has been pointed out above, there would have been grave constitutional doubt as to the power of Congress to make such a change in the law applicable to transfers made nearly three and a half years before its enactment. Such transfers could hardly be called "prior but recent transactions," and they were certainly not "transactions consummated within the year."

Congress did not, however, so limit the effect of Section 202 (a) (3) of the Revenue Act of 1924. It made that provision in terms applicable to property acquired by a transfer in trust "after December 31, 1920." We submit that there is in this evidence of the most persuasive nature that Congress did not regard this provision as a change in the law, but intended it only to remove any possible doubts as to the correctness of the existing interpretation of the 1921 Act. To construe Section 202 (a) (3) of the 1924 Act as a change in the law would lead to grave doubts as to the constitutional validity of the provision. Such doubts should be avoided, and can easily be avoided here by regarding Section 202 (a) (3) as a clarifying enactment and not as a change. In making Section 202 (a) (3) applicable to transfers "after December 31, 1920," Congress has said by almost necessary implication that it did not consider that Section 202 (a) (3) was applicable to any transaction which was not covered

by Section 202 (a) (2) of the 1921 Act. From its terms it must be concluded that the 1924 provision was "declaratory of the law which Congress meant to establish" in 1921. Cf. *Burnet* v. *Guggenheim*, 288 U.S. 280, 283.

CONCLUSION

For this reason, as well as for the reasons advanced in Point I of our principal brief, we submit that the decision of the court below on this question was correct and should be affirmed.

Respectfully submitted.

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